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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 14

GUY T. HELVERING, Commissioner of Internal Revenue,

Petitioner,

v.

WALDEMAR R. HELMHOLZ, As Sole Devisee and Legatee Under The Will Of Irene C. Helmholz, Deceased,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR THE RESPONDENT.

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INDEX.

	Page
Nature of the Case	1
Opinions below	2
Statute involved	3
Statement of facts	3
Questions presented	6
Outline of argument	6
Argument:	
I. As the consent of beneficiaries is necessary, the trust was irrevocable and hence not within the provisions of Section 302(d) of the Revenue Act of 1926	8
II. The legislative history confirms the construction advocated	13
III. Section 302(d), if construed and applied as contended for by petitioner, would be unconstitutional	17
IV. Sub-section (f) of Section 302 governs as to respondent's life interest	18
Conclusion	20

CITATIONS.

Cases:

Caldwell v. *Steinfeld*, 294 F. 270	19
Cawker v. *Dreutzer*, 221 N. W. 401	19
Commission v. *Strauss*, 77 F. (2) 401	2
Dort v. *Helvering*, 69 F. (2) 836	16
First Wisconsin Trust Co. v. *Helmholz*, 198 Wis. 573	6
Florida v. *United States*, 292 U. S. 1	15
Hartley v. *Commissioner*, 295 U. S. 216	16
Heiner v. *Donnan*, 285 U. S. 312	12, 18
Leser v. *Burnet*, 46 F. (2) 756	17, 19
Lit v. *Commissioner*, 72 F. (2) 551	10
May v. *Heiner*, 281 U. S. 238	17
Nichols v. *Coolidge*, 274 U. S. 531	17

Page

Old Mission Co. v. *Helvering*, 293 U. S. 289..... 16
Old Dominion Land Co. v. *United States*, 296 F. 20.. 19
Porter v. *Commissioner*, 288 U. S. 436.....16, 19
Reinecke v. *Northern Trust Co.*, 278 U. S. 339.....8, 10
Reinecke v. *Smith*, 289 U. S. 172.....10, 15
United States v. *Chase*, 135 U. S. 255..... 19

Statutes:

Revenue Act of 1924 17
Revenue Act of 1926 3
Revenue Act of 1932 15
Revenue Act of 1934 15
Revenue Act of 1935 15
Wisconsin Statutes, Sections 232.05, 232.06..... 19

Text Books:

Minor on Real Property, Sec. 1319 19
Words and Phrases, Vol. I, "Any Person"..... 12

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BRIEF FOR THE RESPONDENT.

NATURE OF THE CASE.

The case involves a deficiency assessment of Estate Taxes on the estate of Irene C. Helmholz, deceased. The deficiency alleged is based upon the transfer of certain shares of stock by the decedent to a trustee, nine years before her

death. The stock so transferred was valued by the Commissioner at $319,680. and the deficiency tax assessed was $13,267.34, subject, however, to a credit by reason of inheritance taxes paid the State of Wisconsin.

The Commissioner determined that the entire corpus of the trust should be included in the gross estate of the decedent, resting his decision upon Section 302, sub-sections (c) and (d), of the Revenue Act of 1926. (R. 8-11)

On petition of the taxpayer to the Board of Tax Appeals for a redetermination, the Commissioner's ruling was reversed, the Board holding that no part of the trust estate was subject to the tax. (R. 12-24)

The Commissioner filed a petition for review by the United States Court of Appeals for the District of Columbia, which court affirmed the decision of the Board of Tax Appeals. (R. 42-46)

The Commissioner then petitioned this Court for the writ of certiorari, which was granted. (294 U. S. VII) The granting of the writ, however, we venture to think, was done largely as a matter of course, since the Court of Appeals for the Seventh Circuit had in *Commissioner* v. *Strauss*, 77 F. (2) 401, just construed the statute involved in a way contrary to the construction given it by the Court of Appeals for the District of Columbia, in this case, and also by the Court of Appeals for the First and Second circuits, in cases recently decided by those courts. Parenthetically, we wish to state that we were unaware of the decision in the *Strauss Case* at the time our short brief in opposition to granting certiorari in the present case was prepared and filed else, of course, it would have been referred to. The case had not then appeared in any of the usual publications.

OPINIONS BELOW.

The opinion of the Board of Tax Appeals (R. 12-24) is reported in 28 B. T. A. 165, and the opinion of the United States Court of Appeals for the District of Columbia (R. 42) is reported in 75 F. (2) 245.

STATUTE INVOLVED.

The decedent died October 19, 1927, and the case therefore is governed by the Revenue Act of 1926. (c27, 44 Stat. 9.) According to the petition for certiorari and the specification of errors, in the brief of opposing counsel, only subsection (d) of section 302 of that Act is involved; yet, for reasons hereinafter stated, we quote the provisions of subsection (f) also. Section 302, sub-sections (d) and (f), read:

> Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> • • • • • • • • • •
>
> (d) To the extent of any interest therein of the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke • • •.
>
> • • • • • • • • • •
>
> (f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will • • •.

STATEMENT OF FACTS.

The facts as found by the Board of Tax Appeals (R. 13-16) are as follows:

By a trust indenture dated and executed June 7, 1918 (R. 32), which was amended and supplemented four days later and before execution of the original by the trustee (R. 36), the decedent, Irene C. Helmholz, transferred 999 shares of stock in The Patrick Cudahy Family Company to a trustee. Her father and mother and her brothers and sisters also

were parties to the two instruments and made similar transfers. The indenture provides that the trustee shall receive from time to time the dividends paid on the 999 shares of stock and, after deducting the expenses of administration, shall distribute the net amount (a) to Irene C. Helmholz for life, (b) remainder to her appointee by will for life, and (c) remainder to her issue.

The indenture provides that no appointment shall be for longer than the life of the appointee (R. 34), and, excepting corporations organized for charitable purposes, that appointments shall be made only to natural persons. (R. 37)

The indenture further provides, in paragraph D, that in case a settlor, or "subscriber", should die without surviving issue, and in any one of several other named events, the trustee shall pay the dividends received by it in respect of the stock deposited by such deceased settlor "to the surviving subscribers or their issue living at the time of distribution proportionately by right of representation." (R. 35)

Regarding the termination of the trust, it is provided:

Fifth: The term of the primary trust hereby created shall end (1) upon the death of the last surviving grandchild of Patrick and Anna M. Cudahy, they being then deceased, or (2) upon delivery to the said trustee of a written instrument signed by all of the then beneficiaries, other than testamentary appointees, declaring said trust term at an end, or (3) upon delivery to said trustee of a copy (certified by the president or secretary of The Patrick Cudahy Family Company, and under its corporate seal) of a resolution adopted by unanimous vote of the board of directors of said corporation declaring said trust term at an end, whereupon and in either of said events the said trustee shall distribute the capital stock of said The Patrick Cudahy Family Company to the beneficiaries then entitled to

receive the net dividends thereon other than testamentary appointees; excepting the shares to the dividends upon which such testamentary appointees are entitled, which shall be held by said trustee as hereinbefore provided.

The term of the primary trust hereby created shall also terminate upon the dissolution of said The Patrick Cudahy Family Company in the manner and for any of the causes provided by law, whereupon the trustee shall distribute all the proceeds and assets by it received upon the liquidation of said corporation to the beneficiaries other than testamentary appointees then entitled to receive net dividends or income in the proportion in which they are severally entitled, excepting the proceeds and (or) assets or shares to the net dividends or income upon which testamentary appointees are entitled, which shall continue to be held in trust as hereinbefore provided.

The term of the primary trust hereby created shall also terminate upon the extinction of issue of the said Patrick and Anna M. Cudahy, they being then deceased, whereupon the said trustee shall convey and transfer the stock of said The Patrick Cudahy Family Company to the Wisconsin Trust Company as trustee, to have and to hold the same upon the trusts and for the uses and purposes embraced in a certain resolution or declaration of trust adopted by the board of directors of the Wisconsin Trust Company May 24, 1915, establishing a certain community trust known as the Milwaukee Foundation for administration and distribution as in said trust declaration prescribed and defined, subject, however, to any existing valid testamentary appointments made by subscribers hereto as hereinbefore provided.

Mrs. Helmholz left a brief will by which she devised and bequeathed her property to her husband, Waldemar R.

Helmholz, the respondent in this cause. (R. 15) The will was duly admitted to probate, and also was held by the Wisconsin courts to have been a valid exercise of the power of appointment reserved in the trust indenture. (R. 18) *First Wisconsin Trust Co.* v. *Helmholz*, 198 Wis. 573.

QUESTIONS PRESENTED.

As we understand the position of counsel for the Commissioner, it is contended by them that the stipulations of the trust indenture relating to the termination of the primary trust bring the case within the provisions of subsection (d) of Section 302 of the Revenue Act of 1926. They say it is immaterial that under the terms of the indenture all the beneficiaries must consent before there can be a termination, because, as they maintain, the words, "in conjunction with any person", in subsection (d), include persons who are beneficiaries as well as those who are not.

We deny the validity of that contention.

Further, as to the equitable life interest held by the surviving husband we contend, first, that it is governed by sub-section (f) and not by sub-section (d), since he acquired that interest by the exercise on the part of his wife of a power of appointment; but, second, that it is not includable in the gross estate of the decedent, because the power of appointment was a *special* one, whereas sub-section (f) applies only to property passing under a *general* power of appointment.

OUTLINE OF ARGUMENT.

We respectfully submit the following propositions:

First. That, as the beneficiaries must consent to any revocation, the trust is irrevocable for all practical purposes, and hence also in contemplation of law.

Second. That the history of legislation since the decision rendered by this Court in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, holding that a power of revocation which is dependent for its exercise upon the

consent of the beneficiary does not amount in law to a power of revocation at all, shows conclusively that Congress concurs in that view and intended that sub-section (d) of Section 302 should be construed as not applying to such a case.

Third. That Section 302(d) of the Revenue Act of 1926, if construed and applied as contended for by counsel for the petitioner, would be unconstitutional.

Fourth. That, irrespective of what construction may be placed upon sub-section (d), the equitable life interest held by the surviving husband of the decedent passed to him in virtue of the exercise of a power of appointment and hence is governed by sub-section (f). And that inasmuch as sub-section (f) requires that property passing under the exercise of a general power of appointment only shall be included in the gross estate of the decedent, the equitable life interest is not includable since it passed by reason of the exercise of a special power.

ARGUMENT.

Before entering upon the argument a preliminary observation or two seems in order.

In the brief for the Commissioner it is stated (p. 7) that this case presents the "precise" question involved in Nos. 10 and 36, of the present term. That all three cases call for the construction of sub-section (d) of Section 302 of the Revenue Act of 1926 doubtless is true, but strict analogy certainly ends there. Each case involves its own trust instrument and other facts peculiar to itself, in view of which the use of the word "precise" hardly seems appropriate. We, know, of course, that the Court will consider and determine each case solely upon the basis of its own facts, yet we feel that the indiscriminate grouping and the virtual blanketing under one brief by our esteemed opponents should not pass without this word of comment from us. Of course, not the slightest disparagement of the merits of the other two cases is intended by the observation.

As the Consent of Beneficiaries is Necessary, the Trust Was Irrevocable and Hence Not Within the Provisions of Section 302(d).

No power whatever to "alter or amend" the trust is reserved in the indenture. The amendment of June 11, 1918, was by voluntary action of the settlors, and before the original instrument had been executed by or delivered to the trustee. (R. 36)

Moreover, in form at least, there is no provision at all in the trust indenture for a *revocation*, since the language used simply defines the *duration* of the trust as distinguished from a revocation of it before it has run the allotted time. The words of the instrument are, "The term of the primary trust hereby created *shall end* (1) upon the death of the last surviving grandchild of Patrick and Anna M. Cudahy, they being then deceased, (2) upon delivery to the said trustee of a written instrument signed by all of the then beneficiaries, other than testamentary appointees, declaring said trust term at an end," and so forth. (R. 35)

However, even treating these provisions as though they stipulated in so many words for a power of revocation, every one of them,—except the first, which manifestly is no provision for revocation,—requires for its exercise the cooperation of other persons besides the settlor. And all those other persons are beneficiaries.

In *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, it was, upon full consideration and for a reason whose validity would seem incontrovertible, definitely held that where the power to revoke is contingent upon the consent of the beneficiary it does not amount to a power of revocation at all. Speaking for a unanimous Court, Mr. Justice Stone, at page 346, said:

> If it be assumed that the power to modify the trust was broad enough to authorize disposition of the trust property among new beneficiaries or to revoke the trusts, still it was not one vested in the settlor alone, as were the reserved powers in the case of the two

trusts. He could not effect any change in the beneficial interest in the trusts without the consent, in the case of the four trusts, of the person entitled to that interest, and in the case of one trust without the consent of a majority of those so entitled. *Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial, and consequently adverse, interest, the trust, for all practical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute.* (Our italics)

Nor, we submit, is it a valid objection to the application of the foregoing to the instant case, that here the beneficiary is also settlor, for the fact remains, nevertheless, that she could do nothing in the matter of terminating the trusts without the co-operation of all the other beneficiaries; and it cannot be said, of course, that all, or that any, of the latter would consent. Reasons easily might exist, in fact did exist, for not so consenting. The whole scheme obviously was designed by the father to unify and to continue in his descendants as far as possible the ownership of the estate he had accumulated; consequently but little latitude was allowed any individual "subscriber." He or she could exercise a restricted power of testamentary appointment, and that was all that any of them, acting singly, was permitted to do under the terms of the trust instrument.

In the trust agreement there are provisions for the termination of the trusts, but not one of them is available to one settlor without the co-operation of the others. And as unity and solidarity are outstanding features of the agreement, indeed its basic feature, all presumptions must be strongly against any consent to allow one subscriber to withdraw.

But this latter proposition rests upon an even firmer foundation. In fact, we submit that it is put beyond all question by a provision of the trust agreement itself, for in paragraph (D) it is stipulated that in case a subscriber shall die without surviving issue, and in any one of several

other specified events, the trustee shall pay the net dividends received by it in respect of the stock deposited by such subscriber *"to the surviving subscribers or their issue living at the time of distribution proportionately by right of representation"*. (R. 35)

It thus is clear that each subscriber, not only as regards himself or herself but also as regard his or her issue, has a direct and very substantial interest in the *continuance* of the trust agreement, and hence is to be presumed to decline co-operation with any subscriber who might propose its termination.

These considerations, however, really are superfluous, since under the common-sense ruling of this Court in *Reinecke* v. *Northern Trust Co., supra,* there is a presumption of law as well as of fact that a beneficiary of a trust will not consent to its revocation. See *Reinecke* v. *Smith,* 289 U. S. 172, 176, where the doctrine of *Reinecke* v. *Northern Trust Co.* virtually is reaffirmed; also *Lit* v. *Commissioner* (C. C. A. 3) 72 F. (2) 551, where the interest of one beneficiary was held non-taxable and the interest of another beneficiary was held taxable, because under the terms of the trust the consent to a revocation was required as to the first but not as to the second.

The Revenue Act of 1921 was the one under consideration in *Reinecke* v. *Northern Trust Co., supra.* Whilst that Act contained no provision corresponding to section 302(d) of the Act of 1926, here involved, and whilst the question there arose with reference to the provision covering interests "intended to take effect in possession or enjoyment at or after death," yet the principle laid down obviously is as applicable here as it was there. Seven separate trusts were involved. Counsel for the Commissioner contended that the power of revocation reserved by the settlor did not cease until his death, and hence that the latter event was the point at which the transfer actually took place. This Court sustained that contention with respect to two of the seven trusts. The ruling, however, was upon the distinct

ground that as to those two "there was reserved to the settlor *alone* a power of revocation of the trusts, upon the exercise of which the trustee was required to return the corpus of the trust to him." But as to four of the other five trusts the power of revocation could not be exercised without the consent of the beneficiaries, and, as to the remaining trust, without the consent of *a majority* of the several beneficiaries; and it was held that none of those five trusts was includable in the decedent's gross estate, because of that vital difference between them and the two other trusts.

Manifestly, the whole point and philosophy of the decision were and are, that where a trust can be revoked only with the consent of the beneficiary the nominal power of revocation is thereby so neutralized and emasculated as, in contemplation of law and also as a practical matter, to be treated as non-existent. The principle, we submit, is as applicable and controlling here as it was held to be there; for if a qualifying clause in a provision purporting to reserve the right of revocation takes from the provision its essence and vitality as a revocatory stipulation, then necessarily the provision becomes unusable in *any* connection in which the existence of the power of revocation is essential.

But our opponents object that to construe sub-section (d) as not covering cases where the power of revocation hinges upon the consent of the beneficiary is to read into that subsection words which do not appear in it. Such is the customary formula of protest in every case in which a rigidly literal interpretation of the language of a statute is contended for, and had courts been alarmed at or deterred by the bugaboo many an absurd and unintended meaning would have been attributed to statutes and other writings. The very phrase here involved, "any person", has been construed many times. In some instances its import has been restricted within a narrower compass than a mere abstract consideration of the phrase alone would warrant, whilst in others its meaning has even been broadened and

made more comprehensive than the words, separated from their context and considered apart from the subject to which they happened to relate, would suggest. The cases are too numerous for individual review here. Besides, it would seem quite unnecessary, and we therefore simply cite *"Any Person"*, Volume 1 of the several series of *Words and Phrases.*

In accordance with the familiar yet cardinal rule, that it is the *intention* of the law-making body in the use of the words employed which must be ascertained and, if constitutional, given effect, we invite the Court, first of all, to a consideration of the underlying purpose of sub-section (d).

That purpose, we submit, is fairly plain from the provisions of Sections 301 and 302. By sub-section (a) of Section 301 a tax is imposed in general terms upon the net estate of every decedent dying after its enactment, such net estate to be ascertained as elsewhere in the statute prescribed. Then, by the opening paragraph of Section 302, it is provided how the value of the decedent's gross estate shall be determined. It is to be by including the value at the time of the decedent's death of all property *to the extent of his interest in it* as specified in sub-sections (a) to (g) of that section.

Evidently the object was to reach everything (1) which in simple, indisputable fact was, or (2) which in sound theory and contemplation of law could be treated as being, a part of the decedent's estate at the date of his death, *but nothing more. Heiner* v. *Donnan*, 285 U. S. 312, 322. And this latter, doubtless, because Congress recognized that it had no power under the Constitution to subject a decedent's estate to a tax upon the transfer of something which could not reasonably and fairly be said to be either actually or virtually a part of his estate when he died. Hence the qualifying words, "at the time of his death", in the first paragraph of Section 302, and the repeated use in the sub-sections of the limiting phrase, "To the extent."

When we come to consider sub-section (d) specifically, of course it must be read in the light of this general yet carefully defined purpose of the statute. So reading it, we respectfully submit that the words "any person" must of necessity be taken to mean any person whose consent to the revocation might with reason be counted on, else no ground whatever is left upon which to rest the theory that there remained in the decedent any property interest or power of revocation at all, and consequently, any that ceased with his death. Manifestly, therefore, as we submit, only upon the theory of a certain, or at least a highly probable, consent by the beneficiary to the revocation could the tax be upheld.

Now, this Court, taking the practical view of the matter, and doubtless considering that inasmuch as there is nothing unreal about a tax so likewise there should be nothing imaginary about the existence of the thing taxed, and having in mind human nature as it is respecting the voluntary surrender of economic benefits, in *Reinecke* v. *Northern Trust Co., supra,* concluded that a power of revocation conditioned upon the assent of the beneficiary is merely illusory.

And the soundness of that principle and its applicability here, we submit are both indubitable.

The Legislative History Confirms the Construction Here Advocated.

It is submitted, that the course of legislation shows, even to the point of demonstration, that the principle enunciated by this Court in *Reinecke* v. *Northern Trust Co., supra,* is fully concurred in by Congress, and that it meant Section 302 (d) to be construed in that sense. Singularly enough, we note in the brief of opposing counsel (p. 12) the proposition that the construction of Section 302 (d) for which *they* contend is supported by the legislative history. Since both sides cannot be right, the question is, Which is right?

Counsel quote the report of the Ways and Means Committee, but, as we read the excerpt, the last sentence in it confirms our contention, and quite definitely, and not theirs. Our reply, therefore, is somewhat in the nature of a demurrer. The sentence referred to reads:

> This provision [302(d)] is in accord with the principle of section 219(g) of the bill which taxes to the grantor the income of a revocable trust.

Section 219(g), in express terms, qualifies the phrase "any person" by adding the words "not a beneficiary of the trust"; so if, as stated in the committee report, Section 302(d), relating to the Estate Tax, was intended by Congress to accord with the principle of Section 219(a), relating to the Income Tax, then necessarily it must be read with the same qualification. Certanly 302(d) would be far out of accord with the principle of 219(g) were it not so read, and both would be completely out of accord with reality and the practical if they lacked the qualifying words, either express or implied.

In this connection Government counsel undertake to draw a distinction between a revocable trust as regards the Income Tax and a revocable trust as regards the Estate Tax, and to justify the presence of a restrictive statutory provision in the first and the absence of such a provision in the second. To us the argument appears shadowy and elusive, and we confess difficulty in following it. Of course there are points of difference between the two kinds of tax, but absolutely none, we respectfully submit, which would warrant any distinction so far as the feature now under discussion is concerned; and we therefore urge, particularly in the light of the report of the Committee, that Congress by that report made it plain beyond question that the two provisions were intended to have the same meaning.

And this view finds what we regard as additional convincing support in the further history of Section 302(d).

Three revenue acts have been passed by Congress since the decision in *Reinecke* v. *Northern Trust Co., supra,* was rendered, namely, those of 1932, 1934 and 1935, and yet in none of them was Section 302(d) changed so as to obviate the ruling in that case. Not only so, but reference to the Revenue Act of 1934 will disclose that although, by Section 401 of that Act, sub-section (d) of the Revenue Act of 1926 was amended in several particulars and substantially enlarged, the part of it involved in the present inquiry was left absolutely untouched. That part reads today just as it did when first it became law.

We submit that this highly significant fact precludes any other view than that Congress intended, and still intends, so far as that matter is concerned, that sub-section (d) be construed and administered in the light of this Court's decision in 1929 and in the light of the several other later decisions of lower appellate courts holding as to Section 302(d), itself, that it does not apply where the beneficiary's consent to the revocation must be obtained. Numerous authorities sustain this doctrine. Only four will be cited.

In *Reinecke* v. *Smith,* 289 U. S. 172, 175, this Court, in an opinion by Mr. Justice Roberts, said:

> "* * * the view held by those charged with the enforcement of the Act, *ratified by re-enactment of the section,* alike forbid the adoption of the construction for which the respondents contend."

In *Florida* v. *United States,* 292 U. S. 1, 6, this Court, by Mr. Chief Justice Hughes, expressed itself thus:

> The Congress had knowledge of the construction given Section 13(4) by this Court and of the important effect of that construction in relation to intrastate rates found to be inadequate. The conclusion is not lightly to be reached that the Congress would have undertaken to change a policy of such great importance without explicit language indicating that purpose.

Again, in *Hartley* v. *Commissioner*, 295 U. S. 216, 220, Mr. Justice Stone speaking for the Court, said:

> The re-enactment of the pertinent provisions of Section 202 of the Revenue Act of 1921 in the Acts of 1924 and 1926, without material change, was a congressional recognition and approval of the interpretation of the section by the treasury regulations, which gave them the force of law.

Old Mission Company v. *Helvering*, 293 U. S. 289, 293-294, is to the same effect.

The point is further reinforced by the fact that, on the other hand, Congress has in a number of instances passed curative or similar amendments to Acts after courts had construed them in a certain way. One of these instances happens to be referred to by the Board of Tax Appeals in its opinion in this case, the Board stating that immediately following *per curiam* decisions by this Court in certain cases "Congress amended section 302 (a) of the Revenue Act of 1926 by joint resolution approved March 4, 1931, which specifically provides for the inclusion of property transferred in trust, etc." (R. 19)

Counsel cited *Porter* v. *Commissioner*, 288 U. S. 436, and *Dort* v. *Helvering*, 69 Fed. (2) 836, in support of their contention that the decision of this Court in *Reinecke* v. *Northern Trust Co., supra*, does not control here.

It is quite true that in the opinion in each of those cases, as counsel aver (p. 16), it was stated expressly that the *Reinecke Case* was "not in point", but just how that circumstance renders the case not in point in the controversy now before the Court, is not easy to see. However, a reading of the two cases cited makes it entirely clear why it was held that the ruling in the *Reinecke Case* did not apply in either of *them*. It was simply because in neither of them was the power to change dependent upon the consent or co-operation of the beneficiaries. Both the *Porter Case* and the *Dort Case* were cited by counsel for the petitioner

in the Court below. Moreover, the judge who wrote the opinion of that Court in the *Dort Case* also delivered the opinion in this case, and had no difficulty in distinguishing the latter from the former.

Section 302(d), if Construed and Applied as Contended for by Petitioner, Would Be Unconstitutional.

The trust here under consideration was created by an instrument executed in June, 1918. The Act in which the provisions of Section 302(d) first appeared was not passed until six years later, namely, the Revenue Act of 1924, which was approved June 2, 1924.

By the trust instrument the settlor, nine years prior to her death, divested herself entirely of legal title to the shares of stock, reserving only an equitable life interest in the dividends and the power by will to appoint a like interest. Hence, no part of the trust estate passed at the time of her death, with the possible exception, in a qualified sense, of the equitable life interest to which her surviving husband was appointed by her will. That interest is governed by sub-section (f) of Section 302 and plainly is not taxable, for the reason that the power of appointment reserved was a special and not a general one. All subsequent interests created by the instrument are distinctly of the character of limitations in remainder (*Leser* v. *Burnet*, 46 F. (2d) 756, 760), and all stem back to, and have their "generating source" in, the trust instrument and not in the decedent's death. *May* v. *Heiner*, 281 U. S. 238, 243.

In *Nichols* v. *Coolidge*, 274 U. S. 531, the Revenue Act of 1919 was involved. That Act in express words required the inclusion of transfers made prior to its passage. In holding it unconstitutional in that respect, this Court, in an opinion by Mr. Justice McReynolds, at pages 542-3, said:

> This court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment. [Citing cases] And we must conclude that Section 402(c)

> of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent *prior to its passage* merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation. (Our italics)

Furthermore, if in enacting Section 302(d) Congress intended to cover a case of the kind here presented, that is to say, intended that substantial control over the stock should be deemed to have continued in the grantor up to the date of her death notwithstanding its transfer to the trustee, then we submit that Congress acted in a purely arbitrary and capricious way and in contravention of the Fifth Amendment. The statutory provision, so construed and applied, would, we submit, render it as unconstitutional as, in *Heiner* v. *Donnan*, 285 U. S. 312, sub-section (c) was held to be, on account of the conclusive presumption of testamentary intention prescribed in that sub-section.

Sub-section (f) of Section 302 Governs as to Respondent's Equitable Life Interest.

Apparently this question is not involved in the present review, though the record and course of the litigation leave it occupying a somewhat equivocal position and we therefore deem it advisable to deal with it very briefly.

Sub-section (f) of Section 302 of the Revenue Act of 1926, so far as pertinent here, reads:

> (f) To the extent of any property passing under a *general* power of appointment exercised by the decedent (1) by will, * * *.

The trust agreement provides that "No appointment hereunder shall be effective for a longer period than *the natural life* of the appointee" (R. 34), and the supplemental agreement of four days later says that appointments shall be made only to *natural* persons or to corpora-

tions or organizations created for charitable purposes. (R. 37)

It is clear that these restrictions render the power a special and limited one, inasmuch as Sections 232.05 and 232.06 of the *Wisconsin Statutes* define a general power as being one which authorizes an alienation "*in fee* • • • *to any alienee whatever,*" and a special power as being one which authorizes an alienation "of a *particular* estate or *interest less than a fee*". This is in accord with the common law. *Minor on Real Property,* Section 1319.

The above provisions of the statute apply to personal property also. *Cawker* v. *Dreutzer,* (Wis.) 221 N. W. 401, 413. See *Leser v. Burnet* (C. C. A. 4), 46 F. (2) 756, 758.

If, therefore, the equitable life interest of the respondent is to be included in the gross estate of the decedent, it must be, we submit, by virtue of sub-section (f), and by virtue of that sub-section only, since it is elementary in the law of statutory construction that the general provisions of a statute yield to provisions which deal specifically with one feature of the general subject to which the statute as a whole relates. It was definitely so held by this Court in *United States* v. *Chase,* 135 U. S. 255, 260. Further illustrations of the rule are to be found in *Caldwell* v. *Steinfeld* (C. C. A. 9) 294 F. 270, and *Old Dominion Land Co.* v. *United States* (C. C. A. 4), 296 F. 20.

Moreover, *Porter* v. *Commissioner,* 288 U. S. 436, which holds in effect that each of the sub-sections of Section 302 rests upon its own bottom, also would seem in point.

In consideration of all which, we submit it to be incontrovertible that as to the surviving husband's equitable life interest, at least, no estate tax is imposed.

This point was specifically presented by us before the Board of Tax Appeals, and was specifically sustained by that body. (R. 20-23) Our only reason for alluding to it here is the concluding paragraph of the opinion of the Court of Appeals in the case. That paragraph is as follows:

> The Board held, also, that the life interest in the income of the trust estate passing to respondent should not be included in the gross estate of decedent under sec. (f) of 302. The Board's holding was grounded on the fact that the reserved power of appointment was a special and not a general power. We have not considered the question on this appeal, for it is not raised by any of the assignments of error, nor was it argued or insisted on in brief or oral argument. (R. 45)

In the reasons assigned for not passing on the question, the learned Justice was, in part, mistaken. That is to say, the question was raised by the Commissioner's fourth assignment of error (R. 28). However, it was not included in the "Specification Of Errors To Be Urged", as set forth in the brief of his counsel, nor was it argued by such counsel either orally or by brief, except in a bare allusion to it in the oral reply to our own argument. The question is not presented by the petition for certiorari. We presume, therefore, that the matter stands, and will in any event continue to stand, where the determination of the Board of Tax Appeals placed it, namely, that as to the respondent's life interest, at least, no tax is due.

We do not anticipate an adverse decision by this Court on the broader question relating to sub-section (d). Far from it; but in the event of such a decision we ask that the Court indicate that it does not apply to the respondent's life interest.

Conclusion.

We submit that the decision of the Court of Appeals is, by every test, correct and that its judgment therefore should be affirmed.

Respectfully submitted,

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